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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

JAMES COBB,

Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES,

Defendant and Appellant.

B287090

(Los Angeles County  
Super. Ct. No. BC582690)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Anthony Mohr, Judge. Affirmed.

Collins Collins Muir + Stewart, Tomas A. Guterres,  
Vanessa A. Evangelista, and Joshua S. Shuster; Greines, Martin,  
Stein & Richland, Timothy T. Coates and Carolyn Oill for  
Defendant and Appellant.

The Vartazarian Law Firm and Steven R. Vartazarian;  
Daniels Law and William A. Daniels; The Ehrlich Law Firm and  
Jeffrey I. Ehrlich for Plaintiff and Respondent.

Defendant and appellant County of Los Angeles (County) appeals from the judgment entered in favor of plaintiff and respondent James Cobb (Cobb) following a jury trial in this negligence action for injuries Cobb sustained after a County employee ran over him with a forklift. We affirm the judgment.

### **BACKGROUND**

In January 2015, Cobb was 34 years old and working as a sales executive for Classic Party Rentals (Classic), an event management company. On January 15, 2015, he drove to the University of Southern California (USC) campus to check on two scheduled events. Cobb parked on an adjacent city street and proceeded to a crosswalk that enters the USC campus.

County employee John Hill was driving a forklift on the same city street. At 9:15 a.m., as Cobb was approximately 16 feet into the crosswalk, Hill approached Cobb from behind and ran over him with the forklift.

Hill was not aware that Cobb had been hit and was under the forklift until he heard Cobb screaming. Cobb's legs and feet were trapped beneath the forklift, and his body was dragged approximately four feet before Hill could bring the forklift to a stop.

### **PROCEDURAL HISTORY**

Cobb sued Hill and the County, alleging that Hill had been negligent in operating the forklift and that the County was vicariously liable for Hill's negligence. Cobb subsequently dismissed Hill from the action.

Approximately one month before trial, the County admitted partial liability but maintained that Cobb's own negligence had contributed to his injuries. The County claimed that Cobb was using his cell phone at the time and had walked into the path of the forklift. The matter proceeded to a jury trial on comparative negligence and damages.

### **Motions in limine**

The County filed a motion in limine seeking to preclude Cobb from appealing to the juror's sympathies and emotions, for example, by asking them to put themselves in Cobb's place when determining an appropriate damages award, or suggesting that the County's conduct had endangered the community at large and that the verdict should "send a message" to the County. The trial court denied the motion without prejudice, noting that if the County took issue with any of Cobb's arguments, it would have to "ask to approach or jump up and say something."

The trial court denied a similar motion by Cobb to preclude the County from making "tactical apologies" in front of the jury by stating that it was sorry that the accident had occurred or that it sympathized with Cobb's injuries. The court noted that if the County made any such statements, Cobb could respond by arguing that the County "fought us every inch of the way and wouldn't take any responsibility until the 11th hour."

### **Jury verdict and judgment**

After the trial, the jury returned a special verdict finding that Cobb had not been negligent and awarding him a total of \$10,897,636.61 in damages, consisting of \$109,096.61 for past medical expenses; \$83,360 for lost earnings; \$2,500,000 for past physical, mental, and emotional pain and suffering; \$905,180 for future loss of earnings, and \$7,300,000 for future physical, mental, and emotional pain and suffering. The trial court denied the County's motion for a new trial, and this appeal followed.

### **CONTENTIONS ON APPEAL**

The County contends the judgment should be reversed and the matter remanded for a new trial on damages because (1) the award of noneconomic damages is excessive and the result of misconduct by Cobb's counsel; (2) the trial court committed

prejudicial error by admitting irrelevant evidence; and (3) the trial court failed to properly instruct the jury.

## **DISCUSSION**

### **I. Excessive damages**

#### ***A. Standard of review***

The standard of review on a claim of excessive damages is well settled: “The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.] All presumptions favor the trial court’s ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of weighing conflicting evidence rather than our standard of review under the substantial evidence rule. [Citations.] [¶] We must uphold an award of damages whenever possible [citation] and ‘can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.’ [Citations.] [¶] In assessing a claim that the jury’s award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor. [Citation.]” (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.)

#### ***B. Noneconomic damages were not excessive***

The jury in this case heard evidence that Cobb’s legs and feet were crushed by a five-ton forklift. The swelling caused by Cobb’s injuries were so severe that Cobb’s doctors were concerned he would lose his right leg.

Cobb testified that he underwent extensive surgery to remove necrotic flesh in his legs and to apply skin grafts with donor skin taken from his thighs. He explained that recovery from the surgery was extremely painful because the surface of the skin has numerous nerve receptors. Cobb testified that he now lacks sensation in areas where skin grafts were applied and where donor skin was removed, and that he has accidentally cut and burned himself in those areas without noticing.

Cobb also underwent surgery to repair multiple fractures in his feet. Metal plates, brackets, and screws were placed in Cobb's left foot to realign and repair the broken bones, and he will require further surgery to remove that hardware. Cobb experiences permanent residual pain, and he cannot stay on his feet for more than 30 minutes at a time.

Cobb testified that his toes are out of alignment, and that he steps on his own toes four to five times a day. His toe joints "pop" when he walks, and that popping sensation makes him feel queasy. At night, he feels like ants are crawling inside his legs. Cobb testified that he can no longer run, hike, camp, or go to the beach, and that unless he wears orthotics and compression stockings, his legs "balloon up." Cobb further testified that he gained 50 pounds since the accident, that he tires easily, and misses being active.

*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, on which the County relies as support for its excessive damages claim, is distinguishable. The court in that case reversed a jury award of \$3 million in past noneconomic damages as excessive, in light of evidence that the plaintiff's condition had "improved steadily and dramatically." By the time of the trial, the plaintiff's pain "was at a low level, intermittent, and confined to the area around her scar; her daily activities had returned to normal with the exception of minor physical limitations with specific

recreational activities; her scar was small and far less noticeable; and her anxiety and stress were substantially reduced.” (*Id.* at p. 302, fn. omitted.)

Here, in contrast, the evidence showed that Cobb is permanently disabled, experiences constant pain, and can no longer participate in physical activities he once enjoyed. The extensive scarring on his legs has left Cobb self-conscious and reluctant to “show much skin.” Cobb stated that he “used to have a life” that has “shrunk away,” that he feels like an “old man” and that his friends have moved on without him.

In light of the evidence, we cannot conclude, as a matter of law, that the jury’s noneconomic damages award is so high that it shocks the conscience and suggests passion or prejudice on the part of the jury.

### ***C. Misconduct by counsel***

Misconduct by counsel during closing argument can constitute prejudicial error entitling the opposing party to reversal of the judgment and a new trial. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802.) Failure to timely object, however, forfeits any appellate challenge premised on such misconduct. (*Horn v. Atchison, T & S.F.R. Co.* (1964) 61 Cal.2d 602, 610 (*Horn*); *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598-599.)

The County’s appellate brief lists nine pages of alleged misconduct by Cobb’s counsel during closing argument. The record shows, however, that the County raised only a single objection during closing argument, to a statement by Cobb’s counsel that the County was using Hill, the driver of the forklift, “as a prop to try to take the attention away from what they’re doing here with the attorneys and the witnesses, and trying to put it on him, to make it like it’s about him.” The County’s failure to timely object forfeits its challenge to the alleged

instances of attorney misconduct during closing argument. (*Horn, supra*, 61 Cal.2d at p. 610.)

The County's motion in limine seeking to preclude improper argument by Cobb's counsel did not preserve the issue on appeal. When denying that motion, the trial court stated that the County would have to "jump up and say something" if it took issue with any of counsel's arguments. The County failed to do so.

We reject the County's argument that any objection to the alleged attorney misconduct would have been futile because the trial court repeatedly overruled the County's objections, on relevance grounds, to evidence concerning County safety standards during Cobb's examination of the County's witnesses. The County's relevance objections did not preserve any claim that Cobb's counsel committed misconduct while examining those witnesses. (Evid. Code, § 353, subd. (a); see *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564-565.)

## **II. Alleged evidentiary errors**

The County argues that the trial court erred by admitting evidence concerning the County's liability, such as noncompliance with forklift safety rules. The County maintains that such evidence was prejudicial and irrelevant in light of its admission of liability. We review the trial court's decisions regarding the admission of evidence for abuse of discretion. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

During the trial, the County asserted a comparative fault defense, arguing that Cobb was using his cell phone and was therefore distracted at the time of the accident. The County incorrectly contends that evidence concerning this defense theory was the only evidence relevant to comparative fault. The "fundamental purpose" of comparative fault is "to assign

responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties.” (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829.) Evidence of the County’s comparative negligence was relevant to the jury’s allocation of damages. The trial court did not abuse its discretion by admitting such evidence.

The County forfeited any argument that its responses denying certain requests for admissions (RFAs) should not have been admitted into evidence on the grounds that the responses were irrelevant and the civil discovery statutes did not authorize their admission because it failed to raise those objections at trial. Objections the County made during Cobb’s examination of County witnesses regarding the RFAs as “argumentative,” or “calls for speculation,” did not preserve its challenge on appeal. (Evid. Code, § 353.)

### **III. Alleged instructional error**

The County contends the trial court erred by refusing to instruct the jury that Cobb’s loss of future earning capacity must be based on a finding that such loss was “reasonably probable” and that the County’s liability was limited to vicarious liability for Hill’s negligence.

#### **A. Standard of review**

We review de novo whether a challenged instruction correctly states the law. (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 24.) If instructional error has occurred, the judgment may be reversed only when the reviewing court, after an examination of the entire case, including the evidence, concludes that the error resulted in a miscarriage of justice. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054.) “To determine whether an erroneous instruction requires reversal, we ‘must determine whether it is reasonably probable that a result more favorable to the appealing party would have been



reached in the absence of error. [Citation.]’ [Citation.] Although there is no precise formula for determining the prejudicial effect of instructional error, we are guided by five factors: (1) the degree of conflict in the evidence on the critical issue; (2) whether the jury asked for a rereading of the instruction; (3) the closeness of the jury’s verdict; (4) whether opposing counsel’s closing argument contributed to the instruction’s misleading effect; and (5) the effect of other instructions in remedying the error. [Citation.]” (*Deutsch v. Masonic Homes of California, Inc.* (2008) 164 Cal.App.4th 748, 775.)

***B. Lost earning capacity***

The trial court gave the following version of the CACI No. 3903D instruction on future economic damages based on loss of earning capacity:

“The loss of James Cobb’s ability to earn money. [¶] To recover damages for the loss of the ability to earn money as a result of the injury, James Cobb must prove the reasonable value of that loss to him. It is not necessary that he have a work history.”

Before the jury was instructed, the County made the following oral request to modify the CACI No. 3903D instruction: “[W]e would ask that there be a reasonable probability language provided in this instruction because that is the plaintiff’s burden of proof.” The trial court denied the request, but stated that the County could argue reasonable probability and lost earning capacity during closing argument. The County argues that the trial court erred by denying its request, and that under *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881 (*Licudine*), the court should have instructed the jury that an award for Cobb’s loss of earning capacity must be based on a finding that the loss is “reasonably probable” to occur.

In *Licudine*, the issue was whether the evidence supported a \$730,000 award to a plaintiff who claimed loss of earning capacity as an attorney, based solely on the fact that she had been admitted to, but had not yet attended, Suffolk Law School in Boston. (*Licudine, supra*, 3 Cal.App.5th at pp. 889-890.) The trial court set aside the award, finding that there had been “no evidence whatsoever of the compensation earned by graduates of any law school, much less the law school plaintiff chose to attend, or compensation of any attorneys, no matter how experienced.” (*Id.* at p. 890.)

This court affirmed the trial court’s decision and held “that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving.” (*Licudine, supra*, 3 Cal.App.5th at p. 894.) We reasoned that “requiring the plaintiff to prove that it is reasonably probable that she could have earned the salary she now claims is foreclosed by virtue of her injury ensures that the jury’s fixing of damages is not wholly, and thus impermissibly, speculative. [Citations.]” (*Id.* at pp. 895-896.)

Our decision in *Licudine* supports a modification to CACI No. 3903D that incorporates the reasonable probability standard articulated in that case. CACI No. 3903D was in fact revised in May 2017 to include such a standard.<sup>1</sup> We conclude, however,

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<sup>1</sup> CACI No. 3903D, as revised in 2017, states in relevant part: “To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff*] must prove: [¶] 1. That it is reasonably certain that the injury that [*name of plaintiff*] sustained will cause [him/her] to earn less money in the future than [he/she] otherwise could have earned; and [¶] 2. The reasonable value of that loss to [him/her]. [¶] In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff*] could have earned without the injury to what [he/she] can still earn with the injury. [Consider

that the trial court's refusal to modify the instruction, even if erroneous, was not prejudicial.

There was no conflict in the evidence regarding the salary Cobb would have earned had he remained in the same sales executive position he held at Classic at the time of his injury. Cobb as well as the experts for both parties testified that Cobb received a base salary of \$54,000 per year, and that he was entitled to quarterly bonuses for selling the company's services. There was evidence that although Cobb had been employed at Classic for only six months at the time of his injury, he had been given responsibility for USC, Classic's biggest account at the time.

The key issue on which the parties disagreed was whether Cobb could continue to perform as a sales executive using an assistive device such as a motorized scooter. The parties' experts disagreed as to whether Cobb could do so. Cobb testified that using a motorized scooter was not feasible, and Cobb's former regional manager at Classic agreed, noting that use of a motorized scooter while overseeing the setup of a major outdoor event presented safety concerns to Cobb and to others working on the setup. The jury considered and weighed this evidence in determining the reasonable value of Cobb's loss of earnings.

During closing argument, the County argued that the jury should consider whether Cobb suffered a reasonable probability of loss of future earning capacity, given that he could return to work using an assistive device. Cobb's counsel reread the CACI No. 3903D instruction to the jury but did not argue against a reasonable probability standard. The jury was also instructed that it could not speculate or guess in awarding damages and

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the career choices that [*name of plaintiff*] would have had a reasonable probability of achieving.] It is not necessary that [he/she] have a work history."

that Cobb was obligated to mitigate his damages. The jury did not ask for the CACI No. 3903D instruction to be reread, nor did it signal any confusion about the calculation of Cobb's damages.

Based on our review of the record as a whole, we conclude that the trial court's refusal to modify the CACI No. 3903D instruction did not result in any miscarriage of justice. (*Mitchell v. Gonzales, supra*, 54 Cal.3d at p. 1054.)

***C. Negligence instruction***

The trial court instructed the jury on negligence as follows:

“James Cobb claims that he was harmed by County of Los Angeles's negligence. To establish this claim, James Cob must prove all of the following:

“1. That County of Los Angeles was negligent;

“2. That James Cobb was harmed; and

“3. That County of Los Angeles's negligence was a substantial factor in causing James Cobb's harm.”

The County contends the jury should instead have been instructed that Cobb had to prove that the County's employee, John Hill, was negligent, that Hill's negligence was a substantial factor in causing Cobb's harm, and that the jury “may not consider the acts or omissions of the County of Los Angeles when determining whether John Hill was negligent.” That final admonition suggests that the jury could not consider whether Hill failed to comply with the County's standards for forklift safety, an issue relevant to the jury's comparative fault determination. Although the County argues that the instruction was intended to make clear to the jury that the County is liable only for Hill's conduct, under the doctrine of respondeat superior, and not for the conduct of any other employee, its proposed instruction fails

to do so. The trial court did not err in rejecting the County's proposed instruction as confusing and legally incorrect.

**DISPOSITION**

The judgment is affirmed. Cobb is awarded his costs on appeal.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
ASHMANN-GERST